MOTION FILED
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No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services, *Petitioner*

v.

JANET J. YUCKERT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

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MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARUGMENT

Respondent hereby moves, pursuant to Sup. Ct. R. 35.5 and 35.6, for leave to file the attached Supplemental Brief. The purpose of this brief is to bring to the Court's attention new evidence regarding the potential effect of changes in Petitioner's policy, embodied in Social Security Ruling 85-28, on the disposition of Respondent's claim.

Counsel for respondent obtained this document on April 7, 1987, the day after it was released from the coverage of a protective order in *Stieberger* v. *Bowen*, 84 Civ. 1302 (LBS) (S.D. N.Y.).

As is discussed in the Supplemental Brief, the document clearly suggests that, if respondent's claim were remanded for review under SSR 85-28, her claim would not be denied as "non-severe." This is contrary to the position which the Solicitor took in oral argument before this Court, in response to questions from Justice O'Connor.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Attached to this Supplemental Brief is a one-page document, from the Associate Commissioner, Office of Hearings and Appeals, to the Chairman, Acquiescence Task Force, regarding: "Memorandum of Intent to Publish Ruling of Acquiescence—Invalidation of Step Two of the Sequential Evaluation Process-ACTION." The memorandum is dated November 20, 1985.[1]

Respondent has consistently argued that his Court need not and should not reach the validity of Social Security Ruling 85-28 in order to decide the outcome of this case. Brief for Respondent at 29. This remains Respondent's position. Nonetheless, because of the possibility that this Court will find otherwise, Respondent wishes to direct the Court's attention to the following statements in the attached memorandum:

> ". . . The *Baeder, Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. *Had they been, it is quite unlikely that they would have been decided at Step 2.*"
>
> * * *
>
> ". . . All three of the claimants [including Janet Yuckert] had some prior work experience and thus the issue of establishing a prima facie case of disability once it is proved that the applicant cannot

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[1] This document was supplied to Respondent's counsel on April 7, 1987 by plaintiffs' counsel in *Stieberger* v. *Bowen*, 84 Civ. 1302 (LBS) (S.D. N.Y.), after the district court in that case lifted a protective order so as to permit release of the document to *Yuckert* counsel. The document was originally provided by the Secretary in reply to discovery requests in *Stieberger.*

The "Acquiescence Task Fore" is an ad hoc group within SSA, created in 1985, to determine whether the Secretary was in compliance with various decisions of the Circuit Courts of Appeals.

perform prior work was present in each case. *Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2.*"

(Emphasis added.)

These statements were made by the head of the Office of Hearings and Appeals, the office which would readjudicate Mrs. Yuckert's claim if it was remanded. They are contrary to the position taken by the Solicitor in oral argument before this Court, when questioned by Justice O'Connor:

Question: And was the respondent's claim evaluated under the Secretary's guidelines 85-28, which talk now in terms of some minimal impairment?

Mr. Kneedler: That interpretive ruling was not in effect at the time that—

Question: So presumably this respondent's claim was not evaluated at Step 2 with that guideline in mind.

Mr. Kneedler: But that guideline as the Secretary made clear in promulgating it, does not state a new policy. It reflects what the proper standard of adjudication should have been and was under the program prior to that time.

Question: Well, it certainly might have been helpful to the administrator considering the claim to have had that in mind, at least if you read about this particular respondent's problems, it would appear anyway that they might well have survived step 2 under that guideline.

Mr. Kneedler: No, I think it is important to bear in mind here, not to focus on respondent's allegations and testimony but the ALJ specifically found that she was exaggerating those claims. He found no objective clinical evidence to suggest the severity of those

symptoms to that extent, so that I think that there is—*it would certainly be our position that even in light of the ruling which we think didn't change things, that her case would have come out the same.*

Question: Well, wouldn't it perhaps be appropriate even if you are correct to remand Ms. Yuckert's claim at least, leave it open in light of the new guidelines?

Mr. Kneedler: I think not, because applying—first of all we would have a concern there about courts sending cases back in light of the new ruling because it suggests the potential for reopening a lot of past claims, even those that are not currently surviving, and *in our view because the ruling did not change the substantive standard of disability, there is no occasion to sent it back. . . .*

Transcript of Oral Argument, January 13, 1987, pp. 7-9 (emphasis added).

Therefore, were the Court to conclude that SSR-85-28 is in any way relevant to the disposition of Ms. Yuckert's case, it would be appropriate for this Court to remand the case for further action in light of SSR-85-28.

Respectfully submitted,

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APPENDIX

MEMORANDUM

DATE: Nov. 20 1985

FROM: ASSOCIATE COMMISSIONER
OFFICE OF HEARINGS AND APPEALS

SUBJECT: MEMORANDUM OF INTENT TO PUBLISH RULING OF ACQUIESCENSE—INVALIDATION OF STEP TWO OF THE SEQUENTIAL EVALUATION PROCESS—ACTION

TO: CHAIRMAN, ACQUIESCENCE TASK FORCE

This is in response to your memorandum of November 5 concerning the courts' holding in *Baeder*, *Johnson*, and *Yuckert*. We have a number of problems with these proposed rulings of acquiescence and recommend that they not be published at this time.

Basically, events have overtaken the need for these acquiescence rulings. We are under the impression that SSR-85-28 is, in effect an acquiescene ruling, accommodating SSA policy to circuit court decisions on Step 2 of the sequential evaluation process. The *Baeder*, *Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. Had they been, it is quite unlikely that they would have have been decided at Step 2.

As we understand SSR 85-28, if a claimant's impairment produces limitations (no matter how minimal or slight), then consideration should be given to how they affect the ability to perform past relevant work (PRW). If

PRW is, in fact, precluded, then Step 2 may not be used. We fail to see how this deviates from the holdings of the courts in the three cited cases. The step that was invalidated is not the one described in SSR-85-28.

If these three rulings are published, we believe that they would have little, if any, impact on our ultimate administrative decisions. All three of the claimants had some prior work experience and thus the issue of esablishing a prima facie case of disability once it is proved that the applicant can not perform prior work was present in each case. Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2. Invalidating Step 2 when it may not be used in any event appears to be a distinction without a difference. Therefore, if SSR 85-28 is properly applied, we do not see how a vehicle to relitigate the issue presented in *Baeder, Johnson*, and *Yuckert* would arise.

Thank you for the opportunity to comment.

Frank V. Smith III

Supreme Court, U.S.
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No. 85-1409

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE PETITIONER IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE PETITIONER IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully moves for leave to file the attached supplemental brief for the petitioner to reply to the supplemental brief after argument that respondent moved for leave to file on April 7, 1987.

In her supplemental brief, respondent brings to the Court's attention a November 20, 1985, memorandum signed by an official of the Department of Health and Human Services, which was obtained through discovery by counsel for the plaintiffs in unrelated litigation. Respondent contends that the views expressed in that memorandum (the Mason memorandum) are inconsistent with the views expressed by counsel for the Secretary during the oral argument before this Court on January 13, 1987, and that

the Mason memorandum therefore might have a bearing on the Court's disposition of this case.

The attached supplemental brief discusses three points. First, we explain the origins and nature of the Mason memorandum, which first came to the attention of this Office on April 3, 1987. Second, we discuss the contents of the Mason memorandum, explaining that the views expressed therein regarding the possible legal effect of Social Security Ruling (SSR) 85-28 on respondent's claim are clearly incorrect and did not represent the position of the Secretary. Third, we discuss the suggestion in respondent's supplemental brief that her case be remanded to the Secretary for reconsideration in light of SSR 85-28.

If the Court grants respondent's motion for leave to file a supplemental memorandum addressing this new evidentiary matter, we submit that the Court also should grant the instant motion for leave to file the attached supplemental brief in reply. Only in that way will the Court have the benefit of each party's submission regarding the Mason memorandum, including the Secretary's disavowal of the views expressed in that memorandum to the extent that they are inconsistent with the views expressed on behalf of the Secretary in this Court.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1987

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENT

On April 7, 1987, respondent submitted a post-argument brief to bring to the Court's attention an internal government memorandum that was obtained through discovery in an unrelated case. The November 20, 1985, memorandum was signed by Lawrence Mason on behalf of the Associate Commissioner for the Office of Hearings and Appeals (OHA) in the Social Security Administration (SSA). It discusses, inter alia, the Ninth Circuit's decision in the instant case and the possible legal effect that Social Security Ruling (SSR) 85-28 might have had on the adjudication of respondent's disability claim if SSR 85-28 had been issued at that time.

Respondent contends in her post-argument brief that the Mason memorandum might have a bearing on the proper disposition of this case. This contention is without merit. As we explain below, the Mason memorandum was but one of many documents that were generated by various HHS offices and personnel during internal deliberations regarding the appropriate departmental response to several court of appeals decisions that addressed the validity of the severity regulation. The particular views in the Mason memorandum upon which respondent relies are demonstrably incorrect, and indeed are refuted both by the text of SSR 85-28 itself and by the terms of the draft document upon which Mr. Mason was commenting. Mr. Mason's views were not adopted by the Department at the time, and they have never represented the official position of the Secretary. The official position of the Secretary regarding the meaning and legal effect of SSR 85-28 (and of the severity regulation it interprets) remains the position that was set forth in SSR 85-28 itself, in the petition for a writ of certiorari and the briefs on the merits in this case, and in the statements made by counsel for the Secretary during the oral argument before this Court.

Moreover, the question before the Court in this case is the facial validity of the severity regulation itself, not the interpretation or application of SSR 85-28. The question of the validity of the severity regulation turns on (i) the text and the Secretary's official interpretation of the regulation; (ii) the support for the regulation in the text and legislative history of the Social Security Act and amendments thereto; and (iii) Congress's ratification of the severity regulation when it enacted Section 4 of the Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460, 98 Stat. 1800) against the background of the language in the current

regulation and the Secretary's public and official interpretation of that language.[1] By contrast, the internal Mason memorandum is irrelevant to the Court's consideration of the validity of the severity regulation. That memorandum was prepared after Congress ratified the regulation in 1984; it reflected only one view within HHS regarding the intended significance of SSR 85-28, not the meaning or validity of the severity regulation itself; and Mr. Mason's understanding even of SSR 85-28 was not adopted by the Secretary, much less by Congress. The Mason memorandum therefore should have no bearing on the disposition of this case.

1. We shall first explain the origins and purpose of the Mason memorandum, of which the Solicitor General and his staff previously were unaware. See note 3, *infra*. It and numerous other documents were generated pursuant to an internal review process that was instituted by the Secretary to address the general issue of the Secretary's "acquiescence" in adverse court of appeals decisions. As part of that review process, the Secretary established an Acquiescence Task Force within HHS. The Task Force was responsible for reviewing opinions rendered by the courts of appeals in Social Security cases in order to determine whether there was any variance between circuit precedent and SSA policies. If there was such a variance, then SSA would decide whether to follow or revise its policies within that circuit.[2]

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[1]See SSR 82-55 and 82-56, which are reproduced in an appendix to respondent's brief (see Resp. Br. App. 1a-19a) and were discussed in the legislative history of the 1984 Act (see H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984)). SSR 82-55 was rescinded in April 1985 (see Pet. Br. 48 n.2), and SSR 82-56 was replaced in April 1986 by SSR 86-8.

[2]We have been informed that as a result of the Task Force's review, SSA to date has issued 26 "acquiescence rulings" stating that it will follow adverse circuit precedent on particular legal issues at all four levels of the administrative review process, and has issued no rulings

When the Acquiescence Task Force identified a variance between circuit precedent and SSA policies, it prepared a draft "acquiescence ruling" explaining a proposed SSA response to the appellate decision. The draft ruling then was circulated to various offices within HHS for comment. Such draft acquiescence rulings were prepared by the Task Force in November 1985 in response to the Ninth Circuit's decision in the instant case, which invalidated the severity regulation, as well as the related decisions in *Baeder* v. *Heckler*, 768 F.2d 547 (3d Cir. 1985), and *Johnson* v. *Heckler*, 769 F.2d 1202, reh'g denied, 776 F.2d 166 (7th Cir. 1985), petition for cert. pending, No. 85-1442. The Mason memorandum provided comments on those draft rulings. Such comments also were furnished to the Task Force by the Office of the General Counsel and other components of HHS.[3] However, no acquiescence rulings were issued

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stating that it will decline to follow adverse circuit precedent. For a discussion of the procedure that would be followed in the latter event, see OHA Interim Circular 185 (June 3, 1985), which has since been replaced by a permanent circular, OHA Circular III-I (Aug. 22, 1986). (Interim Circular 185 is reproduced at *Stieberger* v. *Heckler*, 615 F. Supp. 1315, 1403-1405 (S.D.N.Y. 1985), preliminary injunction vacated, 801 F.2d 29 (2d Cir. 1986)). See also 52 Fed. Reg. 2557 (1987) (proposed regulations on acquiescence rulings). The Acquiescence Task Force's functions have now been assumed by a unit within SSA.

[3]The Mason memorandum was brought to our attention by the Civil Division of this Department on April 3, 1987, after that Division was contacted by an attorney for the plaintiffs in the *Stieberger* litigation, cited in note 2, *supra*. That attorney also is counsel of record for the American Diabetes Association, et al., which filed a brief amici curiae in the instant case.

The plaintiffs in *Stieberger* challenge the Secretary's legal authority to decline to follow circuit precedent within the circuit. After the Second Circuit vacated a preliminary injunction in *Stieberger*, the plaintiffs challenged the implementation of the Secretary's new approach to acquiescence. In that connection, they sought through discovery all documents relating to the work of the Acquiescence Task Force. The Secretary contended that all such documents of a recommendatory nature are protected by, inter alia, the deliberative process privilege. The

regarding the court of appeals decisions in those three cases.[4]

Thus, the Mason memorandum was not prepared as part of the actual adjudication of respondent's individual claim, but rather was one of a number of documents prepared by various components and personnel within HHS in connection with HHS's internal deliberations regarding matters of general policy. Such deliberations not infrequently generate varying impressions, views and recommendations among the participants. Indeed, the very purpose of internal

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district court, however, overruled the claim of privilege and ordered that those documents be furnished to plaintiffs' counsel under a protective order.

We have been informed by the Civil Division and HHS that thousands of pages of documents relating to the Task Force's deliberations have been made available to the *Stieberger* counsel under this arrangement. We have been further informed that all of the Task Force's documents relating to severity regulation cases, which total approximately 140 pages, were included in the first batch of documents that was furnished to counsel by letter dated January 5, 1987. The one-page Mason memorandum was one of those documents. Nevertheless, counsel for the *Stieberger* plaintiffs did not raise any issue concerning the Mason memorandum until Friday, April 3, 1987, almost three months after the oral argument in the instant case. On that date, counsel for the *Stieberger* plaintiffs sent a letter to the district court in that case requesting that the protective order be lifted with respect to the Mason memorandum so that the *Stieberger* plaintiffs' counsel could furnish it to counsel for respondent in the instant case. In a conference telephone conversation on the afternoon of Monday April 6, 1987, the Civil Division attorney representing the Secretary in *Stieberger* informed the district court that the Secretary would not object to the lifting of the protective order to that extent. No request has been made to lift the protective order with respect to any other document.

[4]In the instant case and *Johnson*, of course, the Secretary petitioned this Court to review the adverse appellate decisions. With respect to *Baeder*, HHS took the position that the Third Circuit did not intend that decision to bar all use of the severity regulation. See *Wilson* v. *Secretary of HHS*, 796 F.2d 36, 40-42 (3d Cir. 1986), petition for cert. pending, No. 86-897.

agency deliberations, such as those coordinated by the Acquiescence Task Force at issue here, is to ventilate differences, in order to assist the head of the agency in arriving at a single, definitive and sound position on behalf of the agency as a whole. The existence of varying views by some participants in that process therefore in no way undermines the force and legal effect of the agency head's final position. For this reason, the Court in this case should consider only the official position of the Secretary, as reflected in published interpretations and as represented to the Court in this case, not the prior and differing views of Mr. Mason. Out of an abundance of caution, however, we shall now demonstrate that Mr. Mason's understanding of SSR 85-28 was clearly erroneous and is entitled to no weight here.

2. Respondent relies on the Mason memorandum's discussion of SSR 85-28 for the proposition that if her case were adjudicated under that Ruling, it would not be denied at Step 2 of the sequential evaluation process. This discussion, respondent maintains, is contrary to the position taken by counsel for the Secretary during the oral argument before this Court on January 13, 1987.

In the passages from the transcript of oral argument quoted by respondent (Supp. Br. 3-4, quoting Tr. Oral Arg. 7-9), counsel for the Secretary represented the Secretary's position to be: (i) that "because [SSR 85-28] did not change the substantive standard of disability, there is no occasion to send [respondent's case] back [to the Secretary]"; and (ii) that "even in light of [SSR 85-28], which we think didn't change things, that [respondent's] case would have come out the same." Those representations were then and remain now the official position of the Secretary. Indeed, SSR 85-28 states that it merely "interprets and clarifies *current policy*" (Pet. App. 40a (emphasis added)). By contrast, the views expressed by Mr. Mason in the November 20, 1985

memorandum did not then and do not now reflect the Secretary's position. Those views, in fact, were erroneous in several critical respects.[5]

a. The Mason memorandum first states (App., *infra*, 1a):

> We are under the impression that SSR 85-28 is, in effect, an acquiescence ruling, accommodating SSA policy to circuit decisions on Step 2 of the sequential evaluation process.

In the very next sentence, the memorandum cites "[t]he *Baeder*, *Johnson* and *Yuckert* cases" as the circuit decisions to which SSR 85-28 supposedly was intended to conform. For at least three reasons, however, it is manifest that SSR 85-28 was *not* intended to constitute an "acquiescence" in the Ninth and Seventh Circuits' decisions in the instant case and in *Johnson*: (i) the instant case had not been decided by the Ninth Circuit and the Secretary had petitioned for rehearing en banc in *Johnson* when SSR 85-28 was signed by the Commissioner in September 1985; (ii) those decisions *invalidated* (in whole or in part) the very regulation that SSR 85-28 interprets; and (iii) the Secretary obviously would not have petitioned for a writ of certiorari in the instant case if SSR 85-28 were intended to constitute a nationwide "acquiescence" in the judgment under review.[6] Thus, the Mason memorandum rests on a fundamental misconception of the purpose of SSR 85-28.

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[5]Moreover, in describing SSR 85-28, the Mason memorandum uses such phrases as "[w]e are under the impression" and "[a]s we understand SSR 85-28" (App., *infra*, (a), thereby reflecting uncertainty regarding the intended import of SSR 85-28, which had then only recently been issued.

[6]*Baeder* was decided prior to the issuance of SSR 85-28. SSR 85-28 accordingly discusses *Baeder*, but takes the position that the Third Circuit there had not actually intended to invalidate the severity regulation (Pet. App. 40a; see note 4, *supra*).

b. The analysis in the Mason memorandum also is flawed. Respondent quotes the following two passages from the memorandum (Resp. Supp. Br. 2, quoting App., *infra*, 1a-2a):

> The *Baeder, Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. Had they been, it is quite unlikely that they would have have [*sic*] been decided at Step 2.
>
> * * * * *
>
> All three of the claimants [*i.e.*, the plaintiffs in *Baeder, Johnson*, and *Yuckert*] had some prior work experience and thus the issue of establishing a prima facie case of disability once it is proved that the applicant cannot perform prior work was present in each case. Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2.

However, the reasons *why* Mr. Mason believed that the claims in the instant case and in *Johnson* and *Baeder* would not have been denied at Step 2 are clearly incorrect.

Mr. Mason's reasoning is elaborated upon in several sentences that respondent omits (App., *infra*, 1a):

> As we understand SSR 85-28, if a claimant's impairment produces limitations (no matter how minimal or slight), then consideration should be given to how they affect the ability to perform past relevant work (PRW). If PRW is, in fact, precluded, then Step 2 may not be used.

SSR 85-28 says nothing of the kind. To the contrary, as SSR 85-28 itself makes clear, the very purpose of the severity regulation is to weed out claimants whose impairments *are* "minimal" or "slight" —or, in the operative language of the regulation, whose impairments are not "severe" because

they do not "significantly limit" the ability to do "basic work activities" (20 C.F.R. 404.1521(a), 416.921(a))—without the need to address the factors that are considered only at subsequent steps in the sequential evaluation process.

SSR 85-28 states in this regard (Pet. App. 43a (emphasis added)):

> If [an] assessment shows the individual to have the physical and mental ability(ies) to perform [basic work] activities, *no evaluation of past work (or of age, education, [or] work experience) is needed.* Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.
>
> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

The first of these paragraphs quoted from SSR 85-28 confirms that under the severity regulation Congress ratified (see Pet. App. 38a-39a), a specific assessment of the claimant's ability to perform his past work is *not* necessary if he is found to be able to perform basic work activities. The second paragraph just quoted then explains that the severity regulation, in its practical operation, nevertheless accommodates the considerations underlying the past work inquiry. Thus, the term "basic work activities" is defined to mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. 404.1521(b), 416.921(b). If a person retains the abilities and aptitudes necessary for "most jobs," he ordinarily will be able to do his own past job. See Tr. Oral

Arg. 12.[7] For this reason, the vast majority of individuals whose claims are denied because of the absence of a severe impairment would be found not to be disabled in any event because they are able to do their past relevant work.[8]

SSR 85-28 does introduce one new procedural protection for certain claimants. It states (Pet. App. 43a (emphasis added)):

> If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the *unique features* of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate.

In those limited circumstances, SSR 85-28 provides that the decision-maker should consider the claimant's ability to perform other work in light of his age, education, and work experience (*ibid.*). This provision, however, would not apply to respondent, because her past work was not "unique."

c. These passages in SSR 85-28, just discussed, that address the matter of the claimant's ability to perform his past work were accurately explained by counsel for the

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[7]Indeed, in denying respondent's claim at Step 2, the ALJ found that "[respondent's] medical condition does not significantly limit her ability to perform basic work-related functions, e.g., *real estate salesperson*" (Pet. App. 28a (emphasis added)), which was one of her past jobs (*id.* at 15a).

[8]See Tr. Oral Arg. 15; House Comm. on Ways and Means, 99th Cong., 2d Sess., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* 114 (Comm. Print 1986) (table showing correlation between "not severe" and "past work" denials); Subcomm. on Social Security of the House Comm. on Ways and Means, 96th Cong., 1st Sess., *Actuarial Condition of Disability Insurance—1978* 14-15 (Comm. Print 1979).

Secretary during the oral argument before this Court. See Tr. Oral Arg. 12-16. By contrast, the Mason memorandum that respondent now proffers was simply incorrect in its view that respondent's claim would be considered differently under SSR 85-28. Apparently, Mr. Mason failed to focus on the language in SSR 85-28 that provides for the decision-maker to take the claimant's inability to do his past work into account only if that work had "unique features." That failure is especially curious, because the Task Force's draft acquiescence ruling discussing the Ninth Circuit's decision in the instant case, upon which Mr. Mason was commenting, likewise stated that inability to perform past work will be specifically considered only if that work had "unique features" (App., *infra*, 5a-6a).[9]

3. Because the internal Mason memorandum was incorrect in suggesting that SSR 85-28 was intended to accomplish a substantive change in the severity standard and that the adjudication of respondent's claim would proceed differently if it were considered under SSR 85-28, there is no occasion for this Court to remand respondent's case to the Secretary for reconsideration in light of SSR 85-28. However, should the Court nevertheless decide to dispose of respondent's case in that manner, we urge the Court to make clear that such a disposition was deemed appropriate here only because this case involved an individual claimant who pursued her administrative and judicial remedies in a

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[9]The draft acquiescence ruling addressing the Ninth Circuit's decision in the instant case was among the documents furnished to counsel for the *Stieberger* plaintiffs under the protective order. See note 3, *supra*. Although the government in *Stieberger* asserted the deliberative process and other privileges with respect to that draft and other recommendatory documents (including the Mason memorandum), we have reproduced the draft as an appendix to this brief so that the Court may appreciate the circumstances that gave rise to the Mason memorandum. In doing so, the Secretary of course does not waive the deliberative process or other privileges with respect to any other documents.

timely fashion. A similar order would not be appropriate in a class action with respect to class members who failed to seek review in a timely fashion and who thereby allowed a preliminary administrative decision denying their claims under the severity regulation to become final and binding. See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977); 20 C.F.R. 404.905, 404.921, 404.955, 416.1405, 416.1421, 416.1455. The issuance of a Social Security Ruling interpreting a valid regulation does not authorize a court to order the reopening of closed claims that were denied under that valid regulation.[10] Otherwise, the Secretary could be effectively deterred from issuing the sort of clarifying guidance that often is essential to the sound administration of the Social Security disability programs.[11]

4. For the foregoing reasons and those stated in our opening and reply briefs, it is respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded to the court of appeals for review of the Secretary's decision that respondent does not have a "severe" impairment within the meaning of 20 C.F.R. 404.1520(c) and 404.1521.

CHARLES FRIED
Solicitor General

APRIL 1987

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[10]Similar issues regarding the exhaustion of administrative remedies are presented in *Bowen* v. *Polaski*, petition for cert. pending, No. 86-1617 (filed Apr. 8, 1987). There are three cases pending before this Court in which the validity of the severity regulation was challenged in a class action. *Bowen* v. *Johnson*, petition for cert. pending, No. 85-1442; *Bowen* v. *Dixon*, petition for cert. pending, No. 86-2; and *Bowen* v. *Wilson*, petition for cert. pending, No. 86-897.

[11]Even where Congress enacted a substantive change in the severity regulation in 1984—requiring consideration of the combined effect of multiple impairments (42 U.S.C. (Supp. III) 423(d)(2)(C))—it applied that amendment only prospectively, to determinations made on or after December 1, 1984. See Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(c), 98 Stat. 1801.

APPENDIX

MEMORANDUM

Date: NOV 20 1985

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Memorandum of Intent to Publish Ruling of Acquiescence—Invalidation of Step Two of the Sequential Evaluation Process—ACTION

To: Chairman, Acquiescence Task Force

This is in response to your memorandum of November 5 concerning the courts' holding in *Baeder, Johnson*, and *Yuckert*. We have a number of problems with these proposed rulings of acquiescence and recommend that they not be published at this time.

Basically, events have overtaken the need for these acquiescence rulings. We are under the impression that SSR 85-28 is, in effect, an acquiescene ruling, accommodating SSR policy to circuit court decisions on Step 2 of the sequential evaluation process. The *Baeder, Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. Had they been, it is quite unlikely that they would have have been decided at Step 2.

As we understand SSR 85-28, if a claimant's impairment produces limitations (no matter how minimal or slight), then consideration should be given to how they affect the ability to perform past relevant work (PRW). If PRW is, in fact, precluded, then Step 2 may not be used. We fail to see how this deviates from the holdings of the courts in the three cited cases. The Step that was invalidated is not the one described in SSR 85-28.

If these three rulings are published, we believe that they would have little, if any, impact on our ultimate administrative decisions. All three of the claimants had some prior work experience and thus the issue of establishing a prima facie case of disability once it is proved that the applicant cannot perform prior work was present in each case. Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2. Invalidating Step 2 when it may not be used in any event appears to be a distinction without a difference. Therefore, if SSR 85-28 is properly applied, we do not see how a vehicle to relitigate the issue presented in *Baeder, Johnson*, and *Yuckert* would arise.

Thank you for the opportunity to comment.

/s/ LAWRENCE W. MASON
for FRANK V. SMITH III

[DRAFT ACQUIESCENCE RULING PREPARED BY ACQUIESCENCE TASK FORCE]

Ruling of Acquiescence: *Yuckert* v. *Heckler*, No. 84-4432 (9th Cir. October 24, 1985)

Invalidation of Step Two of the Sequential Evaluation Process Titles II and XVI of the Social Security Act

ISSUE: Whether an individual's impairment(s), alone or in combination, may be found not severe, hence not disabling, based on medical factors alone at Step two of the sequential evaluation process, without consideration of vocational factors.

STATUTE/REGULATION/RULING CITATION: Sections 223(d) and 1614(a)(3) (42 U.S.C. 423(d) and 1382c(a)); 20 C.F.R. 404.1520(c), 404.1521, 404.1522(b), 404.1523, 416.920(c), 416.921, 416.922(b) and 416.923; Ruling 82-56 and Ruling 85-28

CIRCUIT: NINTH (ALASKA, ARIZONA, CALIFORNIA, GUAM, HAWAII, IDAHO, MONTANA, NEVADA, OREGON, WASHINGTON) *Yuckert* v. *Heckler*, No. 84-4432 (9th Cir. October 24, 1985)

APPLICABILITY OF RULING:

This ruling applies only to decisions at the Administrative Law Judge Hearings and Appeals Council levels of appeal pursuant to Interim Circular 185, published in the Federal Register on _____, _____ Fed. Reg. _____.

This ruling explains that the non-severe sequential evaluation provisions of 20 C.F.R. 404.1520(c), 404.1521, 404.1522(b), 404.1523, 416.920(c), 416.921, 416.922(b) and 416.923 are not to be applied in the making of disability determinations for individuals in the Ninth Circuit.

DESCRIPTION OF CASE:

Plaintiff, Janet Yuckert, alleged that she was disabled since October 1979 as a result of dizziness, headaches, vision and equilibrium problems and flat feet. Both of the claimant's treating physicians concluded that she was disabled. Ms. Yuckert worked as a travel agent from 1963 to 1977 and sporadically as a licensed real estate broker during 1978 and 1979. A vocational counselor testified that she was incapable of returning to her past work. The decision of the administrative law judge (ALJ), which became the final decision of the Secretary when the Appeals Council denied review, held that Ms. Yuckert was not disabled on the basis that she did not have a severe impairment. Ms. Yuckert appealed the denial of her claim to federal district court. The district court subsequently affirmed the Secretary's decision, and Ms. Yuckert appealed to the Court of Appeals for the Ninth Circuit, which reversed the judgment of the district court and remanded Ms. Yuckert's claim to the Secretary with instructions to reevaluate her claim without reference to the severity regulation, 20 C.F.R. 404.1520(c).

HOLDING:

The Court of Appeals held that 20 C.F.R. 404.1520(c)[1] conflicted with the language of the Social Security Act that requires the Secretary, in determining disability, to consider factors such as age, education, work experience and ability to do past work. The Court of Appeals further held the severity regulation invalid, rejecting the Secretary's argument that the legislative history of the Act, particularly regarding the 1984 Disability Amendments, supported the non-severe step of the sequential evaluation process. The

[1]Since Ms. Yuckert's claim was for Title II disability benefits, the court discussed only 20 C.F.R. 404.1520(c), not 416.920(c). However, since the regulations are the same, the court's ruling would apply to Title XVI cases, as well as Title II cases.

court, based on prior circuit court decisions, stated that disability determinations are to be made according to a two-step process, with the claimant first showing an inability to perform past relevant work and the Secretary then showing that the claimant nevertheless retains the ability to do other work. The court remanded Ms. Yuckert's claim to the Secretary for consideration without reference to 20 C.F.R. 404.1520(c).

STATEMENT AS TO HOW *YUCKERT* DIFFERS FROM SOCIAL SECURITY POLICY:

In pertinent part, 20 C.F.R. 404.1520(c) and 416.920(c) provide that an individual will be found not disabled without consideration of age, education, and work experience if the individual does not have an impairment or combination of impairments "which significantly limits . . . physical or mental ability to do basic work activities." Regulations 20 C.F.R. 404.1521(b) and 416.921(b) define basic work activities as "the abilities and aptitudes necessary to do most jobs." According to SSR 85-28, an impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at Step two of the sequential evaluation process when the medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a miminal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her ability to perform basic work activities).

In the absence of contrary evidence, an individual whose impairment(s) does not preclude the performance of basic work activities is concluded to be able to perform his or her past relevant work and "not disabled." If the medical evidence, however, establishes only a slight abnormality(ies)

which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instance warrants further evaluation of the individual's ability to do other work considering age, education and work experience, according to SSR 85-28.

The court in *Yuckert* held the severity of the impairment evaluation step of the regulations, 20 C.F.R. 404.1520(c), invalid.

EXPLANATION OF HOW SSA WILL APPLY THE DECISION AT THE ALJ AND APPEALS COUNCIL LEVELS WITHIN THE CIRCUIT:

This ruling applies to claims involving an applicant for disability insurance benefits and/or supplemental security income who resides in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon or Washington at the time of the ALJ's recommended decision or the Appeals Council's review.

The disability determinations of such applicant's [*sic*] will begin as usual with the first step of the sequential evaluation process involving whether the claimant is performing or has performed substantial gainful activity during the period at issue. In cases where a determination is not directed at step one, consideration will proceed directly to step three of the sequential evaluation process, i.e., whether the applicant's impairment(s) meets or equals a listed impairment in Appendix 1, and, if necessary, to subsequent steps of the process.

EFFECTIVE DATE: (DATE OF PUBLICATION)